Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-955

UNARCO INDUSTRIES, INC., an Illinois corporation, and BITUMINOUS CASUALTY COMPANY, an Illinois corporation,

Petitioners,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

BILBY, THOMPSON, SHOENHAIR & WARNOCK, P. C.

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JURISDICTION

The Court is without jurisdiction to grant a writ of certiorari for the reason that 28 USC Section 2101(c) specifically provides:

> §2101. Supreme Court; time for appeal or certiorari; docketing; stay
>
> . . . .
>
> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.
>
> . . . .

Included in the appendix is the notice sent to counsel by the Clerk of the U. S. Court

of Appeals for the Ninth Circuit wherein it is stated that "... a judgment was entered September 17, 1975, [a]ffirming the judgment or order of the Court below ..." Because petitioners neither filed a motion for rehearing nor an application for an extension of time in which to petition for certiorari, the ninety-day statutory period expired on December 16, 1975. The petition for writ of certiorari is dated December 31, 1975, and is therefore untimely. While the mandate of the court of appeals did not issue until October, 1975, the statute is clear that it is the date of the entry of judgment in the court of appeals which determines jurisdiction for certiorari and not the date of the issuance of the mandate. Boylan v. United States, 257 U.S. 614 (1921) (per curiam).

STATEMENT OF THE CASE

In accordance with Rule 40(3) of the

Suppreme Court Rules, respondent supplements and corrects petitioners' statement of the case as follows:

SOUTHERN PACIFIC TRANSPORTATION COMPANY (hereinafter SOUTHERN PACIFIC) maintains hundreds of miles of tracks in Arizona and employs hundreds of Arizona residents. It pays Arizona taxes annually in the hundreds of thousands of dollars. The decedent, Wiley Spears, worked in Bisbee, Arizona, where he was injured while opening a load divider door designed and manufactured for SOUTHERN PACIFIC by UNARCO. When he loosened a handle in the door, a broken swivel pin caused the door to fall and crush him. He was admitted to a hospital located in Tucson, Arizona, where he died six months later.

The testimony at the trial indicated that UNARCO, an Illinois corporation with its principal place of business in Illinois, received an order for the divider doors in

1964 from SOUTHERN PACIFIC, a Delaware corporation with its principal place of business in California. Although the contract for the doors was entered in Illinois, the doors were manufactured in Indiana by a subcontractor of UNARCO. The purpose of the doors was to separate freight within railroad cars. When in an unlocked position, a door was solely dependent upon a swivel pin as its only safety device. In the event the swivel pin failed, the door would also fail. Fifteen sets of the doors were installed in a series of cars. During June of 1966, a pin in one car failed in California, causing an accident. A subsequent investigation by UNARCO and SOUTHERN PACIFIC officials indicated that the swivel pin needed to be reinforced. Accordingly, UNARCO officials redesigned and fabricated a new pin in Illinois. These pins were then sent to California for installation in the 15 cars

in question.

SOUTHERN PACIFIC records introduced at the trial indicated that the new pins were installed in the door which crushed Mr. Spears. This was a contested issue at the time of the trial as the two pins in this car exhibited some qualities of both the old and the new pins. The case was submitted to the jury on theories of negligence and strict liability in tort as against UNARCO but only in negligence as against SOUTHERN PACIFIC. When the sole issue of indemnity was appealed by petitioners to the Ninth Circuit Court of Appeals, SOUTHERN PACIFIC argued that while Arizona law clearly applied under the facts of the case, the petitioners were not entitled to indemnity under either the law of Arizona or the law of California.

ARGUMENT

Petitioners concede in their petition for writ of certiorari that the district

court was required to apply the choice of law rules of Arizona. They also concede that they are entitled to no relief if Arizona indemnity law is applicable. They contend, however, that the district court should have applied California indemnity law because the Arizona choice of law rules require such a result. The district court determined that the facts of the case required that Arizona indemnity law be applied Addressing itself to this ruling by the district court, the court of appeals noted in its memorandum opinion that:

> "[a]nalysis by a district judge of the law of the state in which he sits, his determination of the result which the highest court of that state would probably reach under the same facts, is entitled to great weight. ... That determination 'will

be accepted on review unless shown to be clearly wrong.'" United States v. Pollard, ____ F.2d ____ (slip. op. at 4) 9 Cir. July 2, 1975); Owens v. White, 380 F.2d 310, 315 (9 Cir. 1967); Minnesota Mutual Life Ins. Co. v. Lawson, 377 F.2d 525 (9 Cir. 1967); Bellon v. Heinzig, 347 F.2d 4 (9 Cir. 1965).

The Restatement (Second) of Conflicts devotes a separate section to contribution and indemnity among tortfeasors. Restatement (Second) of Conflicts, Section 173 (1971). Section 173, however, refers the reader back to Section 145 which contains the general tort choice of law rules. Before considering Section 145, however, it is necessary to consider the comments of the drafters of the Restatement on the matter of indemnity

and the choice of law. Comment (b) to Section 173 contains the following discussion:

> On occasion, the law of torts may give one joint tortfeasor a right to indemnity against another joint tortfeasor. When both parties are domiciled in the same state, and particularly, if in addition there is a special relationship between them which is centered in this state, the right of one party to obtain indemnity from the other may be determined by the local law of the state where the relationship is centered (see Illustration 1). In other situations, a right to indemnity in tort will usually be determined by the local law of the state of conduct and injury. (Emphasis added)

UNARCO is an Illinois corporation domiciled in Illinois. SOUTHERN PACIFIC is a Delaware corporation domiciled in California with offices in many states including Arizona. If any special relationship existed between these two parties, it was in Illinois where contractual relations were entered. The fact that SOUTHERN PACIFIC originated its order for the doors in California does not center its relationship with UNARCO in that state; nor does the fact that UNARCO sent the defective doors and pins to California. Any relationship is centered in Illinois where UNARCO accepted the order and designed the goods called for in the contract. The situs of the contractual relations was in Illinois and that is the only possible "special relationship" between the parties.

Because the parties are not domiciled in the same state and because the only

possible "special relationship" would be in Illinois, application of the choice of law principles found in Section 173, comment (b), indicates that any right to indemnity must be determined by the local law of the state of conduct and injury. Injury was solely in Arizona, while negligent conduct occurred in a number of states. Negligence occurred in Illinois because that is where the faulty pins were designed, where UNARCO failed to change the number on the pins so that a new pin could be distinguished from an old one, and where UNARCO failed to institute any inquiries as to whether the new pins had in fact been installed. Negligence also occurred in Indiana as that is where the new pins were manufactured and where they were marked so that all pins, old and new, looked alike. Negligence occurred in California because that is where the old pin allegedly was not replaced by the new pin sent from Illinois.

And finally, negligence occurred in Arizona as that is where the decedent opened the door which crushed him because of the faulty pin. Negligence clearly occurred in four states while the "injury" referred to in comment (b) occurred only in Arizona.

Section 145, to which Section 173 refers, contains a number of factors to be considered in determining the proper law to apply. Accordingly, the considerations in Section 145(2) will be discussed according to the order in which they appear therein.

(a) The place where the injury occurred. The injury occurred in Arizona and it is absurd to contend that this accident was fortuitous. Thousands of SOUTHERN PACIFIC railroad cars pass through Arizona each year. Accidents involving various railroads have caused many personal injuries within Arizona and to contend that these accidents were all purely fortuitous because

trains move in interstate commerce is simply to ignore the many accidents which have occurred. This is not the case of an infrequent plane crash which just happened to occur in Arizona, involving citizens from many other states. Petitioners' reasoning would make any accident involving an interstate carrier a fortuitous event. Arizona has a right as well as an obligation to apply its laws when train accidents occur as frequently as they do within its borders, especially when its residents are injured and when its taxpayers are alleged to be tortfeasors. Arizona clearly has an interest in applying its laws to railroad accidents occurring in Arizona due to the alleged negligence of the SOUTHERN PACIFIC railroad.

(b) The place where the conduct causing injury occurred. Because negligent conduct occurred in Illinois, Indiana, California and Arizona, no state has a

primary contact under this consideration.

(c) The domicile, residence, nationality, place of incorporation and place of business of the parties. Neither party is incorporated, domiciled nor does its major business in the same state. Consequently, more emphasis must be placed on the locations of the injury and negligent conduct. Restatement (Second) of Conflicts, Section 173, comment (b) supra.

(d) The place where the relationship between the parties is centered. A special relationship does not occur simply because a single party orders and receives goods in one state. A relationship occurs, however, when two parties are involved in a transaction in one central location. The facts indicate that the only possible central location is in Illinois where UNARCO accepted the order, thereby entering into contractual relations with SOUTHERN PACIFIC. Before the

order was accepted, there was no relationship whatsoever. Similarly, UNARCO's relationship with its customers is centered where contractual relations are consummated, not where goods are subsequently shipped.

The Supreme Court of Arizona has indicated that the grouping of contacts is to be qualitative rather than quantitative. Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968). Surely both the qualitative and quantitative contacts in this case require that Arizona law be applied. The case law cited by petitioners involves different factual situations and does not compel a different result. Both Kantlehner v. United States, 279 F. Supp. 122 (E.D.N.Y. 1967); and Maryland v. Capital Airlines, Inc., 280 F. Supp. 648 (S.D.N.Y. 1964) involved airplanes which just happened to crash in Maryland after flying over a number of states. Contrary to the present factual situation

where Arizona has significant contacts with the injured parties and one of the tortfeasors, the Capital Airlines court found no contacts whatsoever in Maryland and determined that a special relationship existed in New York because both tortfeasors "did business in New York, most of the negotiations ... took place in New York, the chattel mortgages on the airplanes sold [were] filed in New York and [one of the tortfeasors] maintained a New York bank account to receive monies under the sales arrangement." 280 F. Supp. at 650. In the present factual situation, this theory would best apply to Illinois. The Kantlehner court simply determined that because the decedent was a New York resident and no other state appeared to have any conceivable interest, the forum state of New York should apply its own law because it should always attempt to advance its policies when possible. 279 F. Supp. at 127. This

theory would appear to require the choice of Arizona law.

CONCLUSION

After considering the qualitative contacts and the well established Arizona policy prohibiting indemnity between joint tortfeasors who commit negligent acts in Arizona, it is obvious which law must be applied. The parties are not domiciled nor do they do their principal business in the same state. Similarly, there is no special relationship between the parties in the two states in issue. Consequently, the only qualitative contacts are the place of conduct and the place of injury. Injury was solely in Arizona while conduct occurred in four states including Arizona. The principles of the Restatement clearly dictate that Arizona law must prevail. Accordingly, the petition for writ of certiorari should be denied not only because the Court lacks jurisdiction but

also because it is clear that the district court correctly applied the choice of law rules of Arizona.

Dated this 22 day of January, 1976.

BILBY, THOMPSON, SHOENHAIR &
WARNOCK, P.C.

By Harold C Warnock
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Attorneys for respondent

CERTIFICATE OF SERVICE

HAROLD C. WARNOCK, one of the attorneys for the respondent herein, does hereby certify in accordance with Rule 33(3)(b) of the Supreme Court Rules, that he did, on the 22 day of January, 1976, cause to be deposited in the United States Post Office at Tucson, Arizona, the following:

RESPONDENT'S BRIEF IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI,

that three (3) copies of the said respondent's brief in opposition to the petition for writ of certiorari were placed in an envelope addressed to:

Jon L. Kyl
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorneys for petitioners,

that the necessary postage was prepaid, and that all parties required to be served have been served.

Harold C Warnock
Harold C. Warnock

APPENDIX

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

September 17, 1975

73-2194 BETTA SPEARS, ETC. ET AL vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered September 17, 1975 AFFIRMING the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Paul H. Wolfe, Jr.
Clerk
U.S. Court of Appeals